Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 2003

MARVIN L. BARMES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

MARVIN L. BARMES
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Petitioner Pro Se

QUESTIONS PRESENTED

I. Whether the Third Circuit Panel erred by dismissing Barmes' appeal by extending the fugitive disentitlement doctrine to a person who fails to return to the United States once he has learned of charges pending against him.

II. Whether the Third Circuit Panel erred by applying the Disentitlement Doctrine in this Case, since it failed to consider whether the Government lacks the requisite "clean hands" for invoking this equitable doctrine.

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OPINIONS BELOW

The Order of the Third Circuit Court of Appeals denying the Petition for Rehearing is unpublished, and is reprinted in Appendix A.

The Third Circuit Panel's opinion is unpublished, and is reprinted in Appendix B.

There was no written opinion by the District Court. The District Court Judge simply wrote a short handwritten note on the first page of the pleading denying the motion.

JURISDICTION

The Order denying the timely filed Petition for Rehearing of the Court of Appeals in this case was filed on January 8, 2004. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if (mailed U.S.P.S. first class) postmarked by April 7, 2004.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

This case involves application of the judicially crafted fugitive disentitlement doctrine.

STATEMENT OF THE CASE

On May 6, 2003, a grand jury handed down a sealed indictment consisting of five counts. Barmes has filed nine (9) motions to dismiss the Indictment arguing, *inter alia*, that the

statute alleged to have been violated in Counts 1 through 5 of the Indictment, 21 U.S.C. § 863, exceeds the legislative authority of Congress or, in the alternative, the statute only has effect within those areas external to state legislative power and territory.

United States filed a response to Barmes' motions to dismiss numbers 1 through 7 on July 7, 2003, and argued that the motions should be denied because Barmes was a fugitive. The District Court dismissed Barmes' motions on July 10, 2003, without allowing Barmes an opportunity to even respond.

On July 21, 2003, Barmes filed a motion to alter, amend, vacate, and/or reconsider the Court's Orders of July 10, 2003. Barmes argued, *inter alia*, that the Fugitive Disentitlement Doctrine does not apply, because Barmes is not a fugitive. United States did not respond to Barmes' motion to alter, amend, vacate, and/or reconsider the Court's Orders of July 20, 2003. On July 28, 2003, the District Court summarily denied the motion to alter, amend, vacate, and/or reconsider.

Barmes has also filed four (4) motions to suppress. The District Court, *sua sponte*, denied these motions as well by invoking the fugitive disentitlement doctrine.

On August 6, 2003, Barmes filed his notice of appeal. On August 26, 2003, United States filed a motion for summary action, and Barmes responded in opposition to that motion.

On October 21, 2003, the Third Circuit panel dismissed the appeal by extending the doctrine of fugitive disentitlement beyond which the Supreme Court has sanctioned.

Barmes timely filed with the Third Circuit his Petition for

Rehearing with Suggestion for Rehearing En Banc. On January 8, 2004, the Third Circuit denied the Petition.

This timely petition follows.

REASON FOR GRANTING THE WRIT

The Third Circuit Panel affirmed the district court by ruling that: "[t]he foregoing matter is hereby dismissed pursuant to the doctrine of fugitive disentitlement. See *Molinaro v. New Jersey*, 396 U.S. 365 (1970); *see also United States v. Wright*, 902 F.2d 241 (3d Cir. 1990)."

The Third Circuit Panel's decision conflicts with Supreme Courts precedents, and consideration by the Supreme Court is therefore necessary. Every one of the Supreme Court's disentitlement cases has involved "fugitives" who escaped from custody (actual or constructive) following a criminal trial and conviction. See *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1202 (1993) (flight following conviction); *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985); id. at 721 n.1 (Stevens, J., dissenting) (escape following sentencing); *Estelle v. Dorrough*, 420 U.S. 534 (1975) (escape from jail following sentencing); *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (jumped bail following conviction); *Eisler v. United States*, 338 U.S. 189, 191 (1949) (flight abroad following conviction); *Allen v. Georgia*, 166 U.S. 138, 138-139 (1897) (escape from jail following conviction); *Bonahan v. Nebraska*, 125 U.S. 692 (1887) (same); *Smith v. United States*, 94 U.S. 97 (1876) (same). See also *Goeke v. Branch*, 115 S. Ct. 1275, 1275-1276 (1995) (per curiam) (jumped bail following conviction).

The Panel's decision also conflicts with Third Circuit authority. See *United States v. Wright*, 902 F.2d 241 (3rd Cir.

1990), which concerned an individual who was convicted, disappeared, and his appeal was dismissed, and *Ali v. Sims*, 788 F.2d 954 (3rd Cir. 1986), which concerned a convicted felon who hijacked a plane to Cuba.

The issue on which Barmes seeks the Supreme Court to review involves a question of exceptional importance, because it addresses an expansion of a sanction never authorized by this Court. Barmes simply does not qualify as a "fugitive" under these Supreme Court cases. Every one of the Court's disentitlement cases has involved "fugitives" who broke out of prison or otherwise escaped from lawful custody (actual or constructive) following a criminal trial and conviction. Barmes has never been a "fugitive" within the ordinary meaning of that term (or even the more specialized meaning that has developed in analogous legal contexts).

I. THE THIRD CIRCUIT ERRED BY DISMISSING BARMES' APPEAL BY EXTENDING THE FUGITIVE DISENTITLEMENT DOCTRINE TO A PERSON WHO FAILS TO RETURN TO THE UNITED STATES ONCE HE HAS LEARNED OF CHARGES PENDING AGAINST HIM

A. Summary of the Facts and History.

Barmes has been a resident of the Bahamas since on or about March, 1996. Barmes had traveled back and forth from the United States to the Bahamas for numerous years. During the bond hearing of Barbara Barmes, United States introduced "Government Exhibit 11." Exhibit 11 consists of fax sheets detailing both Marvin and Barbara Barmes' travel to and from Indiana to Nassau, Bahamas. The sheets cover Marvin Barmes between May 1, 2001, and ending on April 7, 2003. Barbara

Barmes was arrested on May 26, 2003. Officer Szurlej testified that Barbara Barmes spent "approximately 150 days either in the Bahamas or traveling back and forth from the Bahamas" between February 11, 2002 and May 26, 2003.

Barmes was in The Bahamas most of 2003, except for short trips back to Vincennes, Indiana. He returned to The Bahamas on April 6, 2003, after a trip to Indiana due to the death of one of his sons. Barmes had a return date of May 13, 2003, which was the same date as his wife (Barbara Barmes) returned to Indiana. Barmes could not return with his wife due to business related reasons, and he had to cancel his return ticket a day or two before the scheduled flight.

On May 6, 2003, a grand jury handed down a sealed indictment consisting of five counts. The Indictment alleges at Count 1 that Marvin and Barbara Barmes did knowingly, intentionally and unlawfully conspire with each other and with persons known and unknown to the grand jury to unlawfully sell and offer for sale unknown drug paraphernalia, as that term is defined in Title 21, United States Code, Section 863(d), contrary to the provisions of 21 U.S.C. §§ 863(a)(1) and 863(b). Count 2 is the substantive offense of knowingly, intentionally and unlawfully offering for sale an unknown item of drug paraphernalia proscribed by 21 U.S.C. §§ 863(a)(1) and 863(b). Counts 3 and 4 charge essentially the same conduct. Count Five charges the same conduct against defendants, but adds the element that they used a communication facility, the internet, in committing, or in causing or facilitating the commission of, the act of offering for sale drug paraphernalia, as that term is defined in 21 U.S.C. §§ 863(a)(1) and 863(b), in violation of § 843(b). In other words, all Counts of the Indictment are based upon a violation of § 863(a)(1).

Barmes filed nine (9) motions to dismiss the Indictment arguing, *inter alia*, that the statute alleged to have been violated in Counts 1 through 5 of the Indictment, 21 U.S.C. § 863, exceeds the legislative authority of Congress or, in the alternative, the statute only has effect within those areas external to state legislative power and territory.

Barmes moved to dismiss the Indictment by filing the following nine (9) motions:

(1) Defendant Marvin L. Barmes' Motion to Dismiss the Indictment No. 1, assuming Congress enacted § 863(a) pursuant to the Commerce Clause of the Constitution, said statute is unconstitutional because the Commerce Clause does not authorize a police regulation to operate within the territorial jurisdiction of the states;

(2) Defendant Marvin L. Barmes' Motion to Dismiss the Indictment No. 2, arguing the United States Constitution does not grant the power to Congress to enact legislation subjecting a person to criminal sanctions for the sell and offer for sale of drug paraphernalia, because the States are separately competent to define and punish that offense;

(3) Defendant Marvin L. Barmes' Motion to Dismiss Counts 2, 3, 4 and 5 of the Indictment - No. 3, arguing that Counts 2, 3, 4, and 5 of the Indictment are multiplicitous;

(4) Defendant Marvin L. Barmes' Motion to Dismiss Counts 2, 3, and 4 of the Indictment - No. 4, arguing that Counts 2, 3, and 4 of the Indictment are lesser included offenses of Count 5 and are therefore the same offenses under the Double Jeopardy Clause of the Fifth Amendment;

(5) Defendant Marvin L. Barmes' Motion to Dismiss Counts 1, 2, 3, 4, and 5 of the Indictment - No. 5, arguing that Counts 1, 2, 3, 4, and 5 of the Indictment must be dismissed since the allegations are so vague and lacking in particularity as to deprive defendant Barmes of his constitutional rights;

(6) Defendant Marvin L. Barmes' Motion to Dismiss Count One of the Indictment - No. 6, arguing that Count One of the Indictment must be dismissed because it does not sufficiently describe a particularized scheme to commit the offense of unlawfully selling or offering for sale drug paraphernalia;

(7) Defendant Marvin L. Barmes' Motion to Dismiss Counts 1, 2, 3, 4, and 5 of the Indictment - No. 7, arguing that Counts 1, 2, 3, 4, and 5 of the Indictment must be dismissed because a mens rea element is not included in the 21 U.S.C. § 863 in violation of the notice requirement embodied in the Constitution;

(8) Defendant Marvin L. Barmes' Motion to Dismiss the Indictment No. 8, arguing that, assuming the Commerce Clause purportedly authorized § 863, (a) the substantially affects commerce test is incorrect, and (b) that drug "pipe" paraphernalia cannot be regulated under the substantially affects commerce test. At stake in these proceedings is whether the federal government may exercise power in derogation of the Constitution, unrestrained by any recognition of the constitutionally protected sovereignty and autonomy of state and local governments or the fundamental rights of American citizens; and

(9) Defendant Marvin L. Barmes' Motion to Dismiss Counts 1, 2, 3, 4, and 5 of the Indictment - No. 9, that Counts 1, 2, 3, 4, and 5 of the Indictment must be dismissed because

United States does not have the authority to enact and enforce 21 U.S.C. § 863 or, in the alternative, this statute can only have effect within areas external to state legislative power and territory.

Barmes also filed four (4) motions to suppress. The District Court, *sua sponte*, denied these motions as well. The record with the District Court discloses outright criminal conduct by United States officials, and the application of the fugitive disentitlement doctrine very effectively conceals and protects lawless law enforcement agents. The Court's discretion ought to be exercised in favor of hearing this appeal if for no other reason than the very troubling conduct of the United States in securing the Indictment against Barmes. A review of this record should persuade the Court that to sit back and say nothing implicitly condones such conduct.

The record discloses that Barmes has shown the District Court, the United States Attorney, the Department of Justice, and the Third Circuit that over $300,000 of seized cash is missing; the agents executing search warrants intentionally vandalized and destroyed property; stole items from the business; were witnessed placing, *inter alia*, adult novelty items and lingerie into their personal cars; and conducted warrantless searches and seizures. See Motions to Suppress No.'s 1, 2, 3, and 4.

On August 22, 2003, Barmes filed his Notice to the Court and Executive Branch Officials. Barmes gave notice to the Court and all Executive Branch officials who advise and act with it, or execute the process of the Court, that subject matter jurisdiction does not exist as clearly established by the record in the instant case. Notwithstanding the record, the Court, other Judicial officers, and Executive Branch officials continue to

unlawfully assert authority over Marvin L. Barmes, Barbara J. Barmes, as well as Brian and Greg Barmes. The District Court supervised a grand jury proceeding, engaged in plea bargaining arrangements, issued arrest warrants, and illegally incarcerated Barbara J. Barmes.

B. Barmes is not a "Fugitive" within the Meaning of the Disentitlement Doctrine.

The Court should accept this Writ and reverse the Third Circuit, because Barmes does not qualify as a "fugitive". Barmes has never been a "fugitive" within the ordinary meaning of that term (or even the more specialized meaning that has developed in analogous legal contexts).

Barmes has not fled from the custody of any court in which he was convicted of a crime; has not otherwise absconded or taken flight from U.S. authorities in violation of any criminal proscription; and has not even departed this country with any intent to avoid prosecution.

The Court must concede that every one of the Supreme Court's disentitlement cases has involved "fugitives" who broke out of prison or otherwise escaped from lawful custody (actual or constructive) following a criminal trial and conviction. And it cannot be disputed that the flight in each of those cases was "a deliberate and *unlawful* flouting of the convicting court's authority to execute its judgment." The government nevertheless convinced the District Court and Third Circuit to endorse a vastly expanded concept of "fugitivity" that would encompass persons who merely are absent from the United States while a criminal charge is pending here against them.

Disentitlement is a "**sanction**" aimed at deterring wrongful

conduct that directly interferes with the disentitling court's processes. For that reason, the definition of "fugitivity" employed in the disentitlement context must include some element of culpability or wrongful conduct. Mere absence from the United States, even when coupled with actual knowledge of pending charges,[1] hardly qualifies as conduct warranting the sanction of disentitlement. Nor does disentitlement serve any deterrent function when a defendant is unaware of the pending charges, or has left the country without any intent to avoid prosecution.

Barmes notes that the government cannot dispute that it never even argued that he left the United States with any intent to avoid prosecution, much less carried its burden of submitting evidence that would show such intent. For that reason, if the Court agrees with any of Barmes' definitions of "fugitivity," it can and should simply reverse the Third Circuit Panel.

C. Barmes is not a Fugitive from Justice.

Even if this Court determines that the doctrine may be applied in this action, the Third Circuit must be reversed, because Barmes does not qualify as a "fugitive." This is so because he has not fled from the custody of any court in which he was convicted of a crime; has not otherwise absconded or taken flight in violation of any criminal prohibition; and has not, for that matter, "fled" from the United States in any meaningful sense of that word. The government has never

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1. As explained below, the ordinary meaning of the word "fugitive" does not include mere absence plus failure to return.

suggested that Barmes fled from a criminal conviction or that his movements violate any criminal proscription, and it did not (and could not) contend that it has proven that Barmes departed this county with an intent to avoid prosecution.

Every one of the Supreme Court's disentitlement cases has involved "fugitives" who escaped from custody (actual or constructive) following a criminal trial and conviction. See *Ortega-Rodriguez*, 113 S. Ct. at 1202 (flight following conviction); *Sharpe*, 470 U.S. at 681 n.2; id. at 721 n.1 (Stevens, J., dissenting) (escape following sentencing); *Estelle v. Dorrough*, 420 U.S. at 534 (escape from jail following sentencing); *Molinaro*, 396 U.S. at 365 (jumped bail following conviction); *Eisler*, 338 U.S. at 191 (flight abroad following conviction); *Allen v. Georgia*, 166 U.S. at 138-139 (escape from jail following conviction); *Bonahan*, 125 U.S. at 692 (same); *Smith*, 94 U.S. at 97 (same). See also *Goeke v. Branch*, 115 S. Ct. 1275, 1275-1276 (1995) (per curiam) (jumped bail following conviction).

Despite the fact that the Supreme Court has approved disentitlement *only* against persons who have already been convicted of crimes, and *only* in cases where there has been a deliberate and unlawful flouting of the convicting court's authority to execute its judgment, the lower courts have not limited their use of disentitlement to this context. On the contrary, they have applied the doctrine to disentitle persons who have never been tried and convicted, who have never been shown to have "fled" in any meaningful sense of that word, and even against persons who merely refused to travel to the United States to face criminal charges.

This case represents a rather stark illustration of the problem. In the District Court's and Third Circuit Panel's view,

the mere fact that Barmes has notice and knowledge of the criminal case and warrant against him; that he is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction; and that [because he] ... has declined to reenter the United States from The Bahamas to submit to the jurisdiction of the Court, he is a fugitive.

This definition of "fugitive" represents a dramatic departure from the limited circumstances in which the Supreme Court has upheld the use of disentitlement. Because disentitlement plainly is a punitive "sanction" (*Ortega-Rodriguez*, 113 S. Ct. at 1207), this Court should limit its use to cases where the disentitled person has been convicted of a crime and has escaped from the custody (actual or constructive) of the convicting court. Such a rule would reserve disentitlement to the most troubling instances of defiance of judicial authority while at the same time ensuring that the "blunderbuss of dismissal" (ibid.) is deployed only against those who have been found guilty of criminal conduct beyond a reasonable doubt. Otherwise, the definition gives rise to serious constitutional concerns.

But even if the Court declines to adopt such a bright-line rule, it should reject the broad definition of fugitive status. The definition does not require a determination that the absent litigant has engaged in criminally proscribed flight, and it even extends well beyond the ordinary meaning of both the word "fugitive" and the conventional legal concept of "fugitive from justice" as developed in several analogous areas of the law.

The word "fugitive" is uniformly defined by dictionaries as "a person who *flees* or *has fled* from danger, justice, etc." *Webster's New World Dictionary of American English* 544 (3d

College ed. 1989).[2] The concept of fleeing (or flight), in turn, not only suggests departure or evasive movement with an intent to avoid capture or detection, but it also logically presupposes knowledge of the thing that is being evaded. One cannot "flee" from a pursuer unless one knows that the pursuer exists. By the same token, merely *declining to travel* to a jurisdiction one left without any intent to evade prosecution cannot accurately be termed "fleeing" or "flight." Purely as a matter of English usage, then, the definition of "fugitive" is untenable.

What is more, in several parallel statutory contexts, Congress has defined the term "fugitive from justice" in a way that is consistent with the ordinary meaning of "fugitive" but inconsistent with the District Court's sweeping definition. The federal firearms laws, for example, make it a crime for a "fugitive from justice" to transport or ship any firearm in interstate commerce. 18 U.S.C. § 922(g). The statute also includes the following definition: "The term 'fugitive from justice' means any person who *has fled from any State to avoid prosecution for a crime* or to avoid giving testimony in any criminal proceeding." 18 U.S.C. § 921(a)(15) (emphasis added). Under that statutory definition, it plainly is not enough merely to decline to travel to the jurisdiction where charges are pending – to be a fugitive, one must flee the jurisdiction with

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2. See also *Webster's II New Riverside University Dictionary* 510 (1994) ("Fleeing, as from the law"; "One who flees <a *fugitive* from justice>"); *American Heritage Dictionary* 538 (2d College ed. 1991) ("Running away or fleeing, as from the law"); *The New Shorter Oxford English Dictionaries on Historical Principles of English* 1038 (1993) ("a person who flees or tries to escape from danger, an enemy, justice, a master, etc.").

the intent to avoid prosecution. As the Ninth Circuit has correctly observed in this context, "[t]he statute provides that *flight* ... is the crime, *not* failure to surrender." *United States v. Durcan*, 539 F.2d 29, 32 (9th Cir. 1976) (emphasis in original).

Another analogous area of federal law is the Felony Fugitive Act, which provides in pertinent part:

> Whoever moves or travels in interstate or foreign commerce *with intent* either (1) to *avoid prosecution, or custody or confinement after conviction*, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, ... which is a felony under the laws of the place from which the fugitive flees, or (2) to avoid giving testimony ..., or (3) to avoid service of ... lawful process ... shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1073 (emphasis added). The lower courts have confirmed what is evident from the face of the statute: that interstate travel with intent to avoid prosecution or custody is an essential prerequisite to being found to be a fugitive felon within the meaning of Section 1073(1). See, e.g., *Hett v. United States*, 353 F.2d 761, 763 (9th Cir. 1965); *Lupino v. United States*, 268 F.2d 799, 801 (8th Cir. 1959). Mere absence from a jurisdiction is insufficient to support a conviction for being a fugitive under Section 1073. See *Barrow v. Owen*, 89 F.2d 476, 478 (5th Cir. 1937) ("mere absence from the state of prosecution ... is not sufficient proof of the federal crime"); *Reis v. United States Marshal*, 192 F. Supp. 79, 81 (E.D. Pa. 1961) (same); *State v. Miller*, 412 P.2d 240, 243 (N.M. 1966) (same).

Finally, Congress has enacted a provision that tolls the statute of limitations for crimes when the defendant is a

fugitive. 18 U.S.C. § 3290. Entitled "Fugitives from justice," Section 3290 states: "No statute of limitations shall extend to any person *fleeing from justice*." Ibid. (emphasis added). In *Streep v. United States*, 160 U.S. 128 (1895), the Court suggested that a predecessor provision that was worded identically required a showing of "flight with the intention of avoiding being prosecuted." Id. at 133. A majority of the circuits have likewise interpreted Section 3290 as requiring a showing of flight, coupled with an intent to avoid prosecution. See, e.g., *United States v. Marshall*, 856 F.2d 896, 900 (7th Cir. 1988) ("government must show that [the defendant] left Illinois with the intent to avoid arrest or prosecution"); *Donnell v. United States*, 229 F.2d 560, 562 (5th Cir. 1956) (Section 3290 tolls limitations period only with respect to those who "absent[] themselves from the jurisdiction of the crime with the intent of escaping prosecution"); *Brouse v. United States*, 68 F.2d 294, 295 (1st Cir. 1933) ("The essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing oneself, with the intent to avoid punishment.").

Requiring the government to prove, at a minimum, that an absent litigant departed the jurisdiction with an intent to avoid prosecution is also entirely consistent with the purposes of the disentitlement doctrine.[3] As the Supreme Court made clear in *Ortega-Rodriguez*, disentitlement is above all a "*sanction* [in the form of] dismissal" (113 S. Ct. at 1207 (emphasis added)), and it is therefore appropriate to confine that sanction to conduct – actual flight with intent to avoid prosecution – that is truly sanctionable. Bail-jumping, escape from custody, and

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3. Accord *$40,877.59*, 32 F.3d at 1156; *Pecoraro v. Commissioner*, 69 T.C.M. (CCH) 2644, 2646 (1995).

flight to avoid prosecution are all independently unlawful acts; Barmes' refusal to leave his Bahama residence and come to the United States to stand trial, by contrast, is not a violation of any legal duty and may not be directly punished. Why, then, should it be indirectly punishable through the disentitlement doctrine?

Moreover, adoption of a broader definition (to include mere failure to travel) would *not* serve the objectives of the disentitlement doctrine. The purposes of deterrence and protecting the disentitling court's dignity, for example, would not be served by disentitling a person who has not been shown to have "fled" from the jurisdiction to avoid prosecution. And it would be odd indeed if conduct that is sufficiently innocent to escape proscription under the Felony Fugitive Act, 18 U.S.C. § 1073, or even to suspend the running of the statute of limitations for federal crimes, would nonetheless be a legally sufficient basis for imposing a punitive sanction on Barmes in this case. This is especially true in the case at bar, since the correct interpretation of the Constitution does not provide any Branch of the Government to enact and prosecute the purported crime at issue herein.

If (as Barmes' contends) fugitive status requires a demonstration by the government that the disentitled person unlawfully departed the jurisdiction with an intent to avoid prosecution, then the Third Circuit Panel must be reversed. The lower court and Third Circuit squarely rejected this definition. There is no need, however, to even determine whether Barmes possessed the requisite intent to avoid prosecution when he departed the United States. The reason is simple: the government never actually argued that point, and its proffer of evidence utterly failed to prove any such intent.

In its response and supporting memorandum, the

government did not contend that Barmes left the United States with an intent to avoid prosecution. In fact, the government's argument on the issue of Barmes' alleged fugitive status relied entirely on the mere existence of an outstanding arrest warrant against him issued on May 7, 2003 (the day after Barmes' indictment was returned under seal).[4] The record clearly discloses that Barmes did not leave the U.S. with knowledge of a pending criminal action.

United States thus failed to prove (or even articulate) that Barmes departed the United States with any intent to avoid prosecution. Having failed to carry its burden, the government should not be permitted a second chance. Accordingly, the Orders of disentitlement should be reversed.

II. IF THE COURT IS OTHERWISE NOT PREPARED TO REVERSE THE THIRD CIRCUIT'S APPLICATION OF THE DISENTITLEMENT DOCTRINE IN THIS CASE, IT SHOULD CONSIDER WHETHER THE GOVERNMENT LACKS THE REQUISITE "CLEAN HANDS" FOR INVOKING THIS EQUITABLE DOCTRINE

In the event that this Court concludes that the disentitlement doctrine can potentially be applied in this context, it should

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4. Officer Szurlej's testimony discloses that United States deemed Barmes a "fugitive" while the Indictment was under seal. "No, Sir, we wanted to arrest both her and her husband. Based on the traffic patterns of passing between here and the Bahamas, we expected her husband to come home and we wanted to arrest her husband. We had a warrant for him, **he is a fugitive from justice**, therefore we thought it was in the best interest to arrest them both at the same time."

nevertheless reverse the District Court's and Third Circuit Panel's Orders. By unlawfully filing a *lis pendens*, stealing and destroying private property, apparently absconding with over $300,000 of cash, and conducting warrantless searches and seizures, the government comes to this Court with "unclean hands," and should accordingly be disabled from invoking the equitable principle of disentitlement. If this Court is not otherwise persuaded that the disentitlement doctrine is inappropriate in this setting, it should vacate the District Court's and Third Circuit Panel's Orders to resolve this issue.

1. The Government may not invoke the equitable doctrine of disentitlement when it comes to court with "unclean hands".

It is well settled that the disentitlement doctrine is an "equitable principle" (*United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985)) that is "to be applied at the discretion of the ... court" (*United States v. $40,877.59 in United States Currency*, 32 F.3d 1151, 1152 (7th Cir. 1994)). "Disentitlement is not a matter of jurisdictional dimension; rather, it is a concept premised on principles of equity." *United Elec. Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1098 (1st Cir. 1992). Accord *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995) ("The power of an American court to disentitle a fugitive from access to its power and authority is an equitable one.").

To invoke any such equitable doctrine, the government must of course come to court with "clean hands." Thus,

> [i]t is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have standing in court he must first show that not only has he a good and meritorious cause of action, but he must

> come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.

Keystone Driller Co. v. General Excavator Co., 290 U.S. 240. 244 (1933) (internal quotations omitted). As the Supreme Court explained nearly 150 years ago, "[t]he equitable powers of this court can never be exerted in behalf of one who has acted fraudulently[] or who by deceit or any unfair means has gained an advantage." *Bein v. Heath*, 47 U.S. (6 How.) 228, 246-247 (1848).

"This maxim is far more than a mere banality." *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806. 814 (1945). Rather, "[i]t is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [other party]." Ibid. Accord *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring in the judgment). And while "'equity does not demand that its suitors shall have led blameless lives,'" *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 493 (1942), nevertheless in the "ordinary case" a "federal court should not ... lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of [achieving its] ends in clear violation of law." *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Applying this principle, the Supreme Court has not hesitated to withhold equitable relief from parties that came to court with unclean hands. See, e.g., *Precision Instrument*, 324 U.S. at 816-820; *Morton Salt*, 314 U.S. at 493-494.

Because "[t]he general principles of equity are applicable in a suit by the United States," *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 506 (1927), it follows that the "clean hands" doctrine applies no less to the government than to any other party.[5] See *ABF Freight System*, 114 S. Ct. at 839 (where false testimony is "knowingly exploited by a criminal prosecutor, such wrongdoing is so 'inconsistent with the rudimentary demands of justice' that it can vitiate a judgment even after it has become final"); *Olmstead v. United States*, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting). Indeed, the Supreme Court has emphasized that the "clean hands" doctrine applies with *greater* force where, as here, the case is affected with a public purpose (*Precision Instrument*, 324 U.S. at 815):

> [W]here a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.

See generally *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,

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5. "Certainly when seeking an equitable remedy the United States is no more immune to the general principles of equity than any other litigant." *United States v. Second Nat'l Bank*, 502 F.2d 535, 548 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975). Accord *United States v. Wilson*, 707 F.2d 304, 312 (8th Cir. 1982) (on denial of rehearing) ("It is well established that the United States is subject to general principles of equity when seeking an equitable remedy").

322 U.S. 238, 246 (1944) (in recognizing courts' power to vacate judgment procured by fraud, explaining that "tampering with the administration of justice" in this way "involves far more than an injury to a single litigant"; rather, "[i]t is a wrong against the institutions set up to protect and safeguard the public").

2. In light of its unlawful conduct in this case, the Government almost assuredly comes to court with "unclean hands".

United States has – so far – successfully argued that the conduct of Barmes permits it to commit multiple violations of the law. The record and evidence discloses that in a parallel civil forfeiture case was filed on August 15, 2001, United States recorded with the Knox County Circuit Court its Lis Pendens Record. On September 26, 2001, the District Court's Order was entered terminating the case. Notwithstanding the fact that no authority exists for United States to file a *lis pendens* in the first instance; the case was closed; and no appeal is pending, United States filed and has not released its Notice Of Lis Pendens. This is potentially criminal conduct, including conspiracy, on the part of all government officials responsible for the filing and refusal to remove the *lis pendens*. Barmes' alleged conduct is simply irrelevant to the unlawful conduct of United States' officials.

Indiana's *lis pendens* statute applies to claims "to enforce any lien upon, right to, or interest in any real estate." IC[6] § 34-34-1-3(a)(3) [now 32-30-11-3(a)(3)]. The notice must include the title of the court, the names of the parties, a description of

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6. "IC" references are to the Indiana Code.

the real estate, and the nature of the lien, right, or interest sought. IC § 34-34-1-3(b) [32-30-11-3(b). However, as relevant to the instant matter, IC § 32-30-11-3(a)(1) only applies to a person who commences a suit "**in any court of Indiana or in a district court of the United States sitting in Indiana**."

Accordingly, United States was without statutory authority, as its counsel misrepresented in its Notice Of Lis Pendens, to even file same, and it has unlawfully maintained the *lis pendens* in knowing violation the law. See IC § 34-34-1 et seq. and 28 U.S.C. § 1964.

The record in this case discloses that during the multiple searches and seizures, federal agents absconded with over $300,000 in cash; stole property; destroyed property; and conducted warrantless searches and seizures. Barmes has never even received a detailed record of what was seized. Barmes has also filed three motions to the District Court issuing the search warrants to unseal the inventory, if any, but the Indiana District Court has simply ignored all three motions even though United States has filed no objection.

The Court may wish to consider, whether – in light of the government's unethical and potentially criminal conduct – the "supervisory" power of the federal courts *forbids*, not permits, the application of the disentitlement doctrine. "[T]he supervisory power," the Supreme Court has noted, "serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980). See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960); *Mallory v. United States*, 354 U.S. 449 (1957); *Mesarosh v. United States*, 352 U.S. 1 (1956); *Upshaw v. United States*, 335 U.S. 410 (1948); *McNabb v. United States*, 318 U.S. 332

(1943). By unlawfully filing a *lis pendens* without even informing the District Court, the government critically undermined the integrity of the judicial system. Moreover, "a result which leaves intact a [*lis pendens* filed in] ... bad faith may encourage repetition of the impropriety disclosed by the record in this case." *Rinaldi v. United States*, 434 U.S. 22, 31 n.17 (1977). See also id. at 34 (Rehnquist, J., dissenting) ("'the Government's attempt to manipulate the use of judicial time and resources through its capricious, inconsistent application of its own policy clearly constitutes bad faith and a violation of the public interest; our sanction of such conduct would invite future misconduct by the Government'"). In short, assuming, arguendo, that the supervisory power could *ever* permit disentitlement in this setting, it cannot avail the government on this record. Having violated the law and misled the lower courts, the government has relinquished any right to call upon the Court's supervisory authority. To the contrary, if anyone needed "supervision" in this case, it is the prosecutors themselves.

Because the Third Circuit Panel decision is contrary to relevant decisions of this Court, a writ of certiorari should issue.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue. The decisions below must be reversed.

Respectfully submitted,

Marvin L. Barmes
6392 E. Overhead Road
Vincennes, IN 47591
(812) 726-4973

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3380

UNITED STATES OF AMERICA,

Appellee,

-vs-

MARVIN L. BARMES,

Appellant,

On Appeal from the United States District Court
For the Western District of Pennsylvania
(Dist. Ct. No. 03-cv-00133-1)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and GREENBERG
Circuit Judges[1]

The Petition for rehearing filed the Appellant in the above-

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1. Judge Greenberg's vote is limited to panel rehearing only.

entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

Richard L. Nygaard
United States Circuit Judge

DATE: January 8, 2004

CH/cc: Mr. Marvin L. Barmes
Paul M. Thompson, Esq.
Bonnie R. Schlueter, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3380

UNITED STATES OF AMERICA,

Appellee,

-vs-

MARVIN L. BARMES,

Appellant.

(W.D. of PA - Pittsburgh No. 03-cr-133-1) (DWA)

Present: Nygaard, Fuentes and Greenberg, Circuit Judges

Motion by Appellee for Summary Action,

Motion by Appellee to Stay Briefing Pending Resolution of Motion for Summary Action.

Response by Appellant to Motion for Summary Action.

Carolyn Hicks, Case Manager
267-299-4926

ORDER

The foregoing matter is hereby dismissed pursuant to the doctrine of fugitive disentitlement. See *Molinaro v. New Jersey*, 396 U.S. 365 (1970); see also *United States v. Wright*,

902 F.2d 241 (3d Cir. 1990).

By the Court,

/s/Richard L. Nygaard
Circuit Judge

Dated: October 21, 2003

CH/cc: Mr. Marvin L. Barmes
Bonnie R. Schlueter, Esq.
Paul M. Thompson, Esq.